

September 8, 2005

Michael R.W. Houston
Rutan & Tucker LLP
[Address Redacted]
Costa Mesa, CA 92628-1950

**Re: Your Request for Informal Assistance
Our File No. I-05-183**

Dear Mr. Houston:

This letter is in response to your request on behalf of Joel D. Kuperberg, City Attorney for the City of Irvine for advice regarding the mass mail provisions of the Political Reform Act (the “Act”).¹ Because the facts presented are of a general nature relating to the governmental decision and do not fully identify the factors involved in the governmental decision, we are treating your request as a request for informal assistance.²

Nothing in this letter should be construed to evaluate any conduct that has already taken place. In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as the finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Please note that there are other bodies of law, separate and apart from the Act’s conflict of interest provisions, which may apply to your situation. For example, Government Code section 1090 generally provides that an officer or employee of a governmental agency may not have an interest in a contract with the officer or employee’s own agency. This letter is limited solely to the provisions of the Act. The Commission has no authority to advise on section 1090. We recommend seeking advice from the Attorney General’s office on section 1090.

QUESTION

Do the Act’s prohibitions against mass mailings at public expense apply if Councilmember Choi’s Academy places an advertisement in a city newsletter when the advertisement includes the official’s name in the name of the business and web address?

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

² Informal Assistance does not confer the immunity provide by a Commission opinion or formal written advice. (Regulation 18329(c)(3), copy enclosed.)

CONCLUSION

The Act's prohibitions against mass mailings at public expense apply if Councilmember Choi's Academy places an advertisement in a city newsletter when the advertisement includes the councilmember's business name or website address, and if it meets the other mass mailing requirements in regulation 18901(a).

FACTS

The city produces a brochure quarterly. The brochure is sent by United States mail to every resident of the city. The purpose of the brochure is to provide community news and describe upcoming community service classes and programs to the city's resident. The city sells advertising space to provide partial funding for the brochure. The cost of the advertising space is approved by the city council annually as part of the budget (which includes a line item for the brochure's revenue). The revenue derived from selling brochure advertising covers the printing and distribution (i.e., mailing) cost for the brochure but does not cover the time and effort of city staff, which design and write the brochure. As a result, some city funds are spent on the production and design of the brochure.

Dr. Choi was elected to the Irvine City Council in November 2004 and assumed office in December of 2004. Dr. Choi is the owner and sole proprietor of a tutoring program known as Dr. Choi's Academy (the "Academy"). According to Dr. Choi, the Academy was organized as an S-corporation approximately two or three years ago. Prior to incorporation, Dr. Choi used the Academy's name as a "DBA" for approximately 15 years and operated in the city for that same period of time.

For approximately 15 years prior to Dr. Choi's election to the city council, the Academy purchased separate advertisement space in the brochure. During that time, the Academy paid the same advertising rate as other advertisers and did not receive any special treatment. During the first approximately 10 years of purchasing advertisement space, the Academy contracted with the publisher of the brochure, who operated as a city vendor to produce the brochure. During the past five years, the Academy has contracted directly with the city to purchase advertisement space.

Dr. Choi was not a public official of the City of Irvine during the contract term of any of the prior advertisement agreements. On November 4, 2004 (prior to Dr. Choi's certification of election and prior to assuming office), Dr. Choi executed an Agreement for advertising on behalf of the Academy to purchase a full-page advertisement in the brochure, which advertisement is scheduled to run for four consecutive quarters. The Academy plans to pay the same advertising rate as other advertisers. Dr. Choi's name appears as part of the business name and as part of the business's website address, but is not otherwise singled out. His picture is not included in the advertisement.

Dr. Choi is obligated by the agreement to pay for the advertisements on a quarterly basis. Among other provisions, the agreement provides that the person

executing the agreement (in this case Dr. Choi) “is formally bound to the provisions of the Agreement.” As a result, both the Academy and Dr. Choi are bound by and obligated under the agreement.

The Academy is Dr. Choi’s primary business and constitutes a significant portion of his family’s income and livelihood. According to Dr. Choi, the brochure is one of the most important sources of advertising because readers tend to keep the brochure to inform themselves about events going on in the city during the quarter of its publication. Thus, according to Dr. Choi, unlike newspaper advertisements that are quickly disposed of, the brochure tends to remain with readers for a longer duration.

ANALYSIS

Section 89001 states that “no newsletter or other mass mailing shall be sent at public expense.” Regulation 18901(a) states that “except as provided in subdivision (b), a mailing is prohibited by section 89001 if all of the following criteria are met:

“(1) Any item sent is delivered, by any means, to the recipient at his or her residence, place of employment or business, or post office box
....

“(2) The item sent either:

“(A) Features an elected officer affiliated with the agency which produces or sends the mailing, or

“(B) Includes the name, office, photograph, or other reference to an elected officer affiliated with the agency which produces or sends the mailing, and is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer.

“(3)(A) Any of the costs of distribution is paid for with public moneys; or

“(B) Costs of design, production, and printing exceeding \$50.00 are paid with public moneys, and the design, production, or printing is done with the intent of sending the item other than as permitted by this regulation.

“(4) More than two hundred substantially similar items are sent, in a singular calendar month, excluding any item sent in response to an unsolicited request and any item described in subdivision (b).” (Emphasis added.)

You acknowledge in your letter, that the newsletter in question meets the three criteria under regulation 18901(a) (1), (3), & (4). Thus, if the newsletter either “features an elected officer affiliated with the agency” or “includes the name, office, photograph,

or other reference to an elected officer affiliated with the agency ... and is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer” it meets all the criteria set forth under regulation 18901(a)(2)(A) and (B) and is a prohibited mass mailing.

As an initial matter in applying subdivision (a)(2) of the regulation, it must be determined which of the two alternate tests applies. The distinguishing factor between the two tests is whether the item sent “is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer.” If the item is so prepared or sent, subdivision (a)(2)(B) applies. Otherwise, the less restrictive standard in (a)(2)(A) applies.

According to your facts, the content of the full page on which the council member’s advertisement appears is controlled by the council member and his business. Thus, the item ultimately sent “is prepared or sent in cooperation, consultation, coordination, or concert with” the council member.

Under subdivision (a)(2)(B), the mailing would be prohibited if it includes the *name*, office, photograph, or *other reference* to the council member. Your letter suggests that the name of Councilmember Choi appears in two places in the item. (1) Dr. Choi’s name appears as part of the business name and (2) as part of the business’s website address. Therefore, we conclude that the publicly funded mass mailing would be prohibited.³

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: John W. Wallace
Assistant General Counsel
Legal Division

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³ You have not suggested any of the exception in subdivision (b) apply, thus we do not analyze subdivision (b).